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CURRENT TOPICS

The Resignations

IT is all very strange. Last Monday week, the PRIME MINISTER wrote to Mr. THORNEYCROFT that his resignation could not help to sustain and might damage the interests which the Cabinet had all been trying to preserve. As we write, the pound stands higher in relation to the dollar than at any time for over three years. We can only conclude that politics and economics are sciences even less exact than law. When in our issue of 28th September last we recorded the rise in the Bank rate under the faintly cynical heading "Wolf," we expected a recession in conveyancing. This has not been as extensive as we feared, but we still have no doubt that we must plan for some time ahead on the basis not only that there will be no public money for new projects but also that there will be no increases in any field where the Government are able to impose a veto. Thus we should abandon for the present and immediate future any ideas about State-supported legal advice or the extension of legal aid to civil proceedings before magistrates or bringing into force s. 21 of the Legal Aid and Advice Act, 1949 (which relates to proper payment in criminal cases). Likewise hopes of being properly paid for leases and conveyances of vacant land (except on sales to local authorities) should be deferred. We must just wait with the rest. We have the feeling, however, that we have not been told everything about the resignations. Most solicitors who found themselves one per cent. apart on quantum would be able to settle at the door of the court. If there is more to it we are entitled to know what it is. There is still a tendency among our masters to tell us only what they think it is good for us to know.

Artificial Insemination

LAST week LORD WHEATLEY, in the Court of Session in Edinburgh, held that a woman who gave birth to a child of which her husband was not the father, and which was the result of artificial insemination without the consent of the husband, was not guilty of adultery. The decision, followed as it was by an urgent plea in Convocation by the ARCHBISHOP OF CANTERBURY for legislation, leaves no doubt of the gravity of the issues involved in this practice. So far as we are aware, the problem has never come before the English courts and there is plenty of room for more than one opinion about whether artificial insemination should constitute adultery. While this is not a subject which is likely to come before the courts except on very rare occasions indeed—the sparsity of judicial authority everywhere is clear evidence of this—we think that it would be useful to examine the reasons for the decision and its implications. The chief implication seems

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to us to be that a substantial number of women whose husbands are infertile, or unwilling to give them children, will be tempted to use this way out of their difficulties. We therefore propose to publish in the near future an article which will examine the medical and legal aspects of the Scottish case.

Restrict Employers' Liability?

SEVERAL of our readers have objected to Mr. R. S. W. POLLARD'S suggestion that something approaching absolute liability should be imposed on motorists, and some have accused us of aiding and abetting him. We merely reported without comment. Those with an affection for radical changes might well consider the proposal put forward by Mr. D. J. PAYNE for abolishing most of the rights of action which employees have against employers for personal injuries arising out of industrial accidents. Details of Mr. Payne's proposal are to be found in "Current Legal Problems, 1957" (Stevens & Sons, Ltd., 35s.). He would confine the right of action to what he describes as cases of "serious personal fault" on the part of employers, and use the sums now paid by employers in insurance premiums to augment the industrial injuries fund. In this way it would be possible to pay benefit on a more generous scale. The compliance of the employers with the law would be secured solely by the criminal law. We doubt whether Mr. Payne's reforms will be any more popular than Mr. Pollard's.

Acceptance of Liability by Insurers

WHEN and why do insurance companies contest claims? Mr. T. W. MARRIOTT, writing in the December, 1957, issue of the *Juridical Review*, gives a detailed answer to this, as well as to a number of other important questions arising out of the subject of his article, "The Influence of Insurance upon Acceptance of Liability." The strength of the doctrine that "the legal duty ignores insurance," even at the present time, is well illustrated by the fact that in *Romford Ice and Cold Storage Co.* v. *Lister* [1956] 2 Q.B. 180 it was the minority opinion of DENNING, L.J., that "an employer who has been fully indemnified by his own insurance company should not be allowed to turn round and sue his servant for a contribution or indemnity." By far the majority of motor accidents, Mr. Marriott points out, are covered by insurance, and the cases which finally come to trial are largely cases chosen by insurers. These fall into three classes: (1) a minority which turn on a point of law; (2) a majority which turn upon a matter of fact which is disputed; (3) cases of dispute as to the quantum of damages. He refers to a "residual minority" of cases contested by the insurers for various reasons—"some where the insurers are prepared to settle but are rushed into litigation by the precipitate action of the plaintiff's advisers." "There are also cases," he adds, "resulting in litigation due to hostility between particular solicitors and individual insurers." The fact that in 70 to 80 per cent. of claims for personal injuries the claimant receives something is mentioned in conjunction with the fact that insurers frequently agree to indemnify persons not specifically named in the policy, such as members of the insured's family, in order to show that insurers "manifestly are amending the rules of liability." From time to time law reformers in this country have recommended the adoption of a less strict condition for compensation than proof of negligence. The insurance companies appear to be anticipating the Legislature.

Magna Carta and the U.S.A.

THOSE who attended the historic ceremony at Runnymede last July, when the American Bar Association's memorial to Magna Carta was unveiled, will be interested to read an American appraisement by Mr. H. M. LUBASZ of the different attitudes of the two nations to their common heritage, in the January, 1958, issue of the *Contemporary Review*. The framers of the constitution of the United States, he observes, saw in Magna Carta "the shining example of a charter that guaranteed the rights and liberties of the government." Their reverence "springs from the conviction that constitutional documents are in some sense the fountain of justice and the sure weapon against its abuse." The purely historical respect is shared by Englishmen, he comments; the faith in what one may call the insurance value of laws and legal documents is not. In praise of the English view he writes: "The law of documents is, after all, the law of dead letters . . . in the last resort government must always be of men, not of laws." Perhaps the writer, in his admiration for the many advantages of an unwritten constitution, tends to ignore the fact that much of the British constitution is enshrined in documents. In a country like the U.S.A. where the constitution could hardly be other than written, it is essential for the people to have faith in the "insurance value" of their documents. We, too, have faith in ours, and while acknowledging with gratitude the graceful compliment implied in his article, we doubt whether our two nations can be said to be "separated" in any way by a common law, as is suggested at the beginning of the article.

The Manchester and Salford Poor Man's Lawyer Association

THE report for 1956–57 of the Manchester and Salford Poor Man's Lawyer Association records a 2 per cent. fall in the number of matrimonial matters brought to the association's centres. An overall reduction in the number of applications was possibly also affected, the report states, by the fact that it was not considered right that cases involving the hire-purchase of television sets, second-hand cars and washing machines should be assisted on a voluntary basis. It is also the association's experience that there is little call for legal aid in county court matters, and the report comments that this may be fortunate in the light of one of their own cases, in which a man and wife, joint defendants to a possession summons concerning an unfurnished flat where they had lived for eleven years, and earning £6 16s. a week in all, with a rent of 17s. 6d. to pay, were assessed as being able to pay £40 towards the costs. The association expresses its gratitude to the solicitors, counsel and social workers who have given their voluntary services.

Binding of Issues: Volume 101

THE Annual Index and List of Statutes to Volume 101 of THE SOLICITORS' JOURNAL is enclosed with this issue, and the 1957 issues can now be accepted for binding (standard green or brown cloth, 28s.; or half calf, 43s., inclusive of postage). The parts (Nos. 1–52 and Index) should be sent carriage paid to 21 Red Lion Street, London, W.C.1, with a note of the sender's name and address. Instructions and remittances should be sent under separate cover.

OCCUPATIONAL DISEASE AND THE LIMITATION ACT

It is provided by s. 2 (1) (*a*) of the Limitation Act, 1939, that no action founded on tort shall be brought after the expiration of six years from the date on which the cause of action accrued. The effect of this clause would at first seem to be quite clear, but in the recent case of *Clarkson* v. *Modern Foundries, Ltd.* [1957] 1 W.L.R. 1210; 101 Sol. J. 960, the court had to decide whether a cause of action was barred which accrued partly outside and partly within this statutory period of limitation.

The plaintiff was employed in the defendants' iron foundry from 1940 until 1951, when he was found to be suffering from pneumoconiosis. It was not disputed that the disease was contracted during the total period of the plaintiff's employment by the defendants, and in 1955 a writ was issued claiming damages for negligence and breach of statutory duty. Counsel for the defendants maintained that the employers' liability was limited to the aggravation of the disease which was found to have accrued from 1949 until the illness was discovered in 1951 and that the plaintiff's cause of action in respect of such part of the disease as might be said to be due to his exposure to pathogenic particles of silica before this period was statute-barred. Medical evidence confirmed that each of the years of his employment had contributed to the causation of the disease and the court found that the years 1949 to 1951 in respect of which the plaintiff's action was not statute-barred "had made a material contribution to the severity of the disease which in all probability already existed."

A material contribution

Donovan, J., before whom the action was heard, referred to, and to a considerable extent relied upon, the decision of the House of Lords in *Bonnington Castings, Ltd.* v. *Wardlaw* [1956] A.C. 613. The facts of this case were similar to those in that of *Clarkson* except that the silica dust which had caused the pneumoconiosis had emanated from two sources. At the material time there was no known protection against dust which was produced by one of the operations but there was against dust which arose from the other and in so far as they had not protected the respondent from this dust the appellants admitted that they were in breach of a statutory duty. They contended, however, that, as there was no evidence to show that the dust to which the respondent was exposed by reason of their breach of statutory duty had contributed materially to his contracting pneumoconiosis, his claim for damages should fail.

This view was not shared by the House of Lords. Lord Reid affirmed the general principle enunciated by the House in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.* [1939] 3 All E.R. 722 (which had been subjected to doubt as a result of the decision of the Court of Appeal in *Vyner* v. *Waldenberg Bros., Ltd.* [1945] 2 All E.R. 547, in which Scott, L.J., suggested that once a definite breach of a safety regulation has been established, the onus of proof shifts to the employers to show that the injury did not arise as a result of the breach), that it was for the employee to prove his case by the ordinary standard of proof in civil actions and that he must show, on the balance of probabilities, that the breach caused, or materially contributed to, his injury. His lordship found that the employee had been able to show that the harmful dust could not be attributed solely to one source or the other and that both had contributed materially to his condition. It was not a question as to which was the more probable source of the respondent's disease, but whether the source which could have been made safe if the safety regulations had been observed could be said to have contributed materially to the respondent's misfortune. It was a question of degree, and unless the contribution could be said to fall within the exception *de minimis non curat lex* it would be regarded as being material. This decision was applied by the House of Lords in *Nicholson* v. *Atlas Steel Foundry and Engineering Co., Ltd.* [1957] 1 W.L.R. 613; 101 Sol. J. 355.

The same reasoning was applied by Donovan, J., in *Clarkson's* case and the learned judge decided that "if it was impossible to distinguish between innocent and guilty dust in the matter of liability . . . it was equally impossible to distinguish between them in the matter of the quantum of damages." The period 1949 to 1951 had contributed materially to the plaintiff's condition and for this reason it was held that the defendants could not rely upon s. 2 (1) (*a*) to avoid liability in respect of such part of the injury as might have been caused during the period 1940–1949.

There would appear to be no reason to doubt the correctness of this decision and the very fact that such an argument has not been raised before, or if it has been raised, that it has not succeeded, is in itself support for the conclusion arrived at by the court. However, it may be wondered why it could not have been held that the cause of action did not accrue until the disease was discovered so that if (as was the case), discovery was not made until 1951 the statutory period of limitation in respect of the injury would not have expired until 1957. Indeed, there would seem to be some support for this view.

When did the action accrue?

The action was brought in negligence and for breach of statutory duty, and in both cases before a plaintiff can recover compensation in respect of his injury he must be able to show that he has suffered damage. It is not sufficient merely to show that the defendant has been negligent or that he has broken a statutory duty, and therefore it could be argued that the plaintiff in *Clarkson's* case, in view of the fundamental principle that the action may be said to accrue at "the earliest time at which an action could be brought" (Lindley, L.J., in *Reeves* v. *Butcher* [1891] 2 Q.B. 509), did not have a cause of action until he was struck down with pneumoconiosis, that is, when he discovered the presence of the disease in 1951.

It is true that the employers' negligent act had been perpetrated since 1940 and that they had been in breach of a statutory duty since that date, but in so far as the employee could not have maintained a successful action because he had suffered no apparent injury it could be suggested that his cause of action had not accrued until the disease was diagnosed.

Support for this view could be found in *Littleboy* v. *Wright* (1662), 83 E.R. 301, where a woman lost her marriage as a result of the utterance of slanderous words. It was held that the Statute of Limitations was not pleadable "as the words are not actionable, without the loss of marriage." In other words, the period of limitation did not begin to run until the effect of the slander was made known, as it was the loss of marriage which gave the cause of action. Could it not be said, in *Clarkson's* case, that the damage was not suffered until the consequences of the negligence and breach of duty were brought to light?

Littleboy v. *Wright, supra,* was affirmed, if not expressly, by Lord Cranworth in *Backhouse* v. *Bonomi* (1861), 9 H.L.

Cas. 503, where he said: "Suppose a slander to be uttered, not actionable in itself, but under which special damage afterwards arose to somebody; the person complaining could bring no action till he had actually suffered the damage." His lordship was of the opinion, apart from special provision of the Statute of Limitations, that the right of action would not accrue until the damage resulted and became apparent.

The facts of *Backhouse* v. *Bonomi* were that mines were worked in such a way as to cause subsidence, which did not occur until after the passing of the relevant period of limitation since the execution of the work. It was held that the action was not barred as the right of action had not accrued until the subsidence occurred. The Court of Appeal reached a similar conclusion on like facts in *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.* [1908] A.C. 27, and before either of these cases, in *Roberts* v. *Reed* (1812), 16 East 215, Lord Ellenborough, C.J., had held that for the purposes of the Statutes of Limitation the relevant time was the falling, and not the undermining, of a wall as "the consequential damage is the cause of action."

Contractual relationship deciding factor

Against these cases must be cited *Howell* v. *Young* (1826), 5 B. & C. 259, where it was held that the misconduct or negligence of a solicitor constituted the cause of action and that the period of limitation began to run from the time of such misconduct or negligence and not from the time when the damage which resulted became obvious. In this case, however, and in those which follow a similar pattern, there is the element of contract between the parties, and this distinguishes the line of authority from that headed by the House of Lords' decision in *Backhouse* v. *Bonomi, supra.*

Howell v. *Young* was recently followed in *Archer* v. *Catton & Co., Ltd.* [1954] 1 W.L.R. 775, where the plaintiff claimed damages for negligence and breach of statutory duty under s. 47 of the Factories Act, 1937, and one of the pleas for the defence was that the action was not brought within six years of the accrual of the cause of action. The plaintiff was employed by the defendants and between 1923 and 1940 was put to work in a confined space and dusty atmosphere. In October, 1943, the plaintiff was found to be suffering from a chest condition which, he alleged, was caused by his subjection to dust during the relevant period of his employment. The writ claiming damages for negligence and breach of statutory duty was issued in September, 1949.

Streatfeild, J., found in favour of the defendants as "the true view in the present case is that all the time up to 1940 when the plaintiff was exposed to this dust . . . there was accrual of the cause of action, and it makes no difference, as Holroyd, J., found in *Howell* v. *Young*, that the plaintiff himself was not aware of the fact that it would have led to ill consequences."

At first sight this decision would appear to dispose of the contention that the cause of action could be said to have accrued at the time when damage was discovered, but the distinction was not apparently drawn between those cases in which the action is founded on tort alone and those in which there is an element of contract. It would seem that the question which must be answered, and which, it is submitted, has not yet been answered authoritatively, is whether the relationship of master and servant as existed in *Clarkson's* and *Archer's* cases is sufficient to enable the court to say that the negligence of the employer may also be related to his contractual relationship with his servant so as to take the case beyond *Backhouse* v. *Bonomi* and within *Howell* v. *Young*.

Comment on this matter would not be complete without mentioning that s. 2 (1) of the Law Reform (Limitation of Actions, etc.) Act, 1954, has added a proviso to s. 2 (1) (*a*) of the 1939 Act to the effect that in cases such as those here considered, the period of limitation is now three years instead of six in respect of causes of action which did not arise before 4th June, 1954. Thus if a workman is to recover compensation, an occupational disease must make itself evident within three years of his ceasing his dangerous employment, unless the court can be persuaded that the *Backhouse* v. *Bonomi* line of authority is the one which must be followed, in which case his action would not be statute-barred until three years from the date of the discovery of the disease.

D. G. C.

PLANNING ENFORCEMENT NOTICES

FRANCIS *v.* YIEWSLEY AND WEST DRAYTON U.D.C.

In an article at 101 Sol. J. 701, it was said that two recent decisions of the High Court had thrown the already complicated law relating to planning enforcement notices into a state of disarray. One of these two cases was *Francis* v. *Yiewsley and West Drayton U.D.C.* [1957] 2 Q.B. 136, in which McNair, J., had, in an action for a declaration, declared invalid an enforcement notice which, had the recipient of the notice been prosecuted for non-compliance with it, would have been upheld by the Queen's Bench Divisional Court in accordance with their earlier decision in *Perrins* v. *Perrins* [1951] 2 K.B. 414.

The article commented that it remained to be seen how the relevant sections of the Town and Country Planning Act, 1947, would be interpreted by the Court of Appeal in the *Yiewsley and West Drayton* case, but that it was an unfortunate position when a person was open to a conviction before the justices, which would be upheld by the Divisional Court, on an enforcement notice which could be declared invalid under the civil jurisdiction of the High Court.

The *Yiewsley and West Drayton* case has since been before the Court of Appeal ([1957] 3 W.L.R. 919; 101 Sol. J. 920), who have upheld the decision of McNair, J., and have expressly stated that *Perrins* v. *Perrins* was wrongly decided (McNair, J., sought to distinguish it).

If the decision of the Court of Appeal is binding on the Divisional Court, the lot of many recipients of enforcement notices has been much simplified and improved, while that of local planning authorities has worsened.

In *Perrins* v. *Perrins*, the Divisional Court were exercising an appellate jurisdiction in a criminal matter, and in this sphere there is no appeal to the Court of Appeal or House of Lords. Is the Divisional Court in a criminal matter independent of the Court of Appeal and bound to follow its own previous decision, or is it bound by the decision of the Court of Appeal? The article mentioned above referred to the earlier well known difference between the criminal and civil jurisdictions of the Court of Criminal Appeal and the Court of Appeal respectively in *R.* v. *Denyer* [1926] 2 K.B. 258 and

Hardie and Lane v. *Chilton and Others* (*No.* 2) [1928] 2 K.B. 306. Neither court would accept the decision of the other and the difference was only resolved some time later by the House of Lords in another case.

It would seem to the writer that the Divisional Court will be bound to follow the decision of the Court of Appeal. It is, after all, a part of the Supreme Court and not, like the Court of Criminal Appeal, a body of independent statutory origin, and, where an appeal does lie, it lies to the Court of Appeal, whereas any appeal from the Court of Criminal Appeal lies direct to the House of Lords. Both the Weekly Law Reports and the All England Reports treat *Yiewsley* as overruling *Perrins*. The remainder of this article will, therefore, assume that the *Perrins* case is no longer good law.

The background

What difference, then, has the *Yiewsley* case made for readers who have to advise on enforcement notices?

Before answering this question, it will be well to review briefly the procedure set out in the 1947 Act.

Section 23 of the Act enables an enforcement notice to be served either in respect of development carried out without planning permission or in respect of breach of a condition subject to which a planning permission has been granted. Subsection (3) of the section provides for a notice to take effect at the end of such period not being less than twenty-eight days as the notice may specify, but allows for an application to be made for planning permission for the retention of the offending development, and provides that, if this happens or if an appeal is made to the justices under subs. (4), the taking effect of the notice is postponed until the final determination of the application or appeal.

Subsection (4) entitles a person served with an enforcement notice to appeal to the justices, who, if satisfied that "permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with," must quash the notice.

Section 24 (1) entitles a local planning authority to enter on land and take steps to secure compliance (other than by the discontinuance of any use of land) with the notice in default of compliance by the person responsible under the notice and to recover the cost from such person, who is expressly forbidden by the subsection to raise as a defence to any proceedings for recovery of the cost any ground on which he could have appealed to the justices. Section 24 (3) entitles a local planning authority to prosecute for failure to discontinue a use or carry out conditions in compliance with an enforcement notice. It contains no corresponding provision to that in subs. (1) prohibiting the defendant from raising as a defence to a prosecution any ground which could have been raised on appeal under s. 23 (4), but the Divisional Court in the overruled *Perrins* case, in effect, read a corresponding provision into subs. (3), so that the defendant could not raise as a defence to a prosecution any such ground.

Results of the *Yiewsley* decision

The effect of the *Yiewsley* case is threefold, since it—

(1) enables a person who has grounds for appealing under s. 23 (4) to have a double bite at the cherry by appealing under s. 23 (4) and raising the same points again later when prosecuted under s. 24 (3);

(2) enables a person who has failed to appeal in time under s. 23 (4) to raise any material points when later prosecuted under s. 24 (3); and

(3) disposes of the difficulties which have arisen in deciding whether any particular case can be brought within the grounds specified in s. 23 (4), so that a wrong choice of procedure will no longer be fatal (for an example of the difficulties which have now disappeared, see the case of *Norris* v. *Edmonton Corporation* [1957] 3 W.L.R. 388; 101 Sol. J. 612, fully discussed in the article at 101 Sol. J. 701).

Tactics in opposing a notice

While, therefore, the task of the reader in advising a client served with an enforcement notice relating to the discontinuance of a use is very much eased, he will have to advise the client whether to appeal under s. 23 (4), if there is still time and there are any grounds for doing so, or to let this opportunity go by and raise any grounds there may be by way of defence to s. 24 (3) proceedings. There is much to be said for the latter course.

On an appeal under s. 23 (4), the onus of proof is quite clearly placed by the section on the appellant and he has to present his case first. On a prosecution under s. 24 (3), however, the overall burden of proof, of satisfying the justices that there has been a contravention of planning control, must rest upon the prosecuting authority. There seems therefore to be a much greater probability of success in upsetting the notice if the grounds are reserved for use against a prosecution. While it is now possible both to appeal under s. 23 (4) and defend under s. 24 (3) on the same grounds, an adverse decision on the s. 23 (4) appeal is bound in practice to diminish the chance of a successful defence on the same grounds under s. 24 (3), bearing in mind that both sets of proceedings will come before the same bench, though perhaps differently constituted. On the other hand, depending on the practice of the bench, there may be a better chance of obtaining costs against the authority on a successful appeal under s. 23 (4), which is a civil proceeding, than on successfully defending the criminal prosecution.

On the whole, it may perhaps be best to appeal under s. 23 (4) if the client has a strong case but to wait and defend a prosecution if his case is somewhat doubtful.

"Breach of condition" notices

A person served with an enforcement notice alleging a breach of condition other than a condition requiring the discontinuance of any use of land, and requiring steps to be taken to comply with the condition, is in a somewhat curious position. When the notice has taken effect the local planning authority may either enter, do the necessary work and recover the cost under s. 24 (1) or prosecute under s. 24 (3). If they take the first course, the owner, having previously failed to appeal under s. 23 (4), could not allege as a defence to proceedings to recover the cost that he had already complied with the condition, as might be the case with a badly drawn ambiguous condition, or that the conditional permission was not effective because of some existing permission without the condition granted either expressly on application or by the Town and Country Planning General Development Order, 1950. But if the authority take the second course, it would seem that he could raise such grounds as a defence to the prosecution. Would the High Court in such a case grant a declaration that the notice was invalid after it had taken effect but before the authority had embarked on either course?

Or after the authority had done the work but before they had taken action to recover the cost? Clearly the wise course for the recipient of such a notice with grounds for appeal under s. 23 (4) is to appeal under that section if he has time and so avoid any procedural uncertainties. Where the condition concerned is one requiring the discontinuance of a use then the authority can only proceed under s. 24 (3), and the recipient of the notice now has the same choice as in the case of a notice requiring the discontinuance of an unauthorised use.

Action for declaration or injunction

It is also pertinent to consider whether in a case where the authority's only remedy to secure compliance with a notice is to proceed under s. 24 (1), i.e., where the offending development is the erection of a building or the carrying out of works, it is open to a person who has failed to appeal within due time under s. 23 (4) when he should have done so to have the notice set aside by action in the High Court for a declaration or an injunction on grounds which he could have raised in the appeal before the authority have actually entered under s. 24 (1). The bar in the section to raising such grounds as a defence only applies to proceedings to recover the cost, and it would seem therefore that there is nothing to prevent such an action succeeding if commenced before the authority's entry, though, the remedies being discretionary, it would be unlikely that an action commenced after the authority had changed its position by carrying out work but before the commencement of proceedings for recovery of the cost would succeed.

The two opposing views

It may well be said generally, therefore, that the taking effect of an enforcement notice is not nearly so effective as has hitherto been generally thought. Is then the Divisional Court right or the Court of Appeal?

The basis of the decision of the Court of Appeal was that s. 24 (1) contains a specific bar to the raising by way of defence of grounds which could have been raised on a s. 23 (4) appeal, but s. 24 (3) does not; therefore Parliament must have intended there to be a difference, and it was not for the court to read into s. 24 (3) a bar which Parliament had not put there.

Yet there is much to be said for the view of the Divisional Court in the *Perrins* case as expressed by Lord Goddard, C.J.: "Whether the corporation were right or wrong in the view which they took here, it seems to me that the Act provides that if a planning authority choose to serve an enforcement notice, and that notice is not challenged within twenty-eight days, it becomes effective, and there is the end of the matter." What is the use of the Act saying a notice shall take effect if in fact it is anything but effective? How curious that two procedures should be available for testing the same point but with different burdens of proof! In what a peculiar position is a person served with an enforcement notice alleging a breach of condition other than one requiring the discontinuance of a use, who has a second opportunity of raising a s. 23 (4) ground of appeal if the authority take one course but not if they take another! The writer finds it difficult to believe that Parliament intended these odd results, and it may well be that the bar in s. 24 (1) was inserted *ex majore cautela* to guarantee to an authority the recovery of the cost of their carrying out necessary works. It has, indeed, a historical origin, for the procedure in the 1947 Act was based on the enforcement procedure in s. 5 of the Town and Country Planning (Interim Development) Act, 1943, which in turn was based on s. 13 of the Town and Country Planning Act, 1932. Under those earlier procedures, an authority had to serve a notice when they intended, as empowered by the Acts, either to carry out work to remove or alter unauthorised buildings or to make an order to prohibit an unauthorised use. The recipient then had a period in which he could appeal to the justices on certain grounds. If he did not appeal, the authority could in the one case do the work and recover the expenses, and there was a similar bar to that which appears in s. 24 (1) of the 1947 Act to the raising as a defence in proceedings for recovery of expenses of any point which could have been raised on appeal to the justices, and in the other case make an order prohibiting the offending use and prosecute for any non-compliance with the order. Under these earlier procedures there was no provision for the notice to "take effect," it was merely a notice of intended action by the authority and there was, therefore, good reason for inserting the bar. Whether under the earlier procedures it would have been possible to raise successfully as a defence to a prosecution for non-compliance with a prohibitory order any point that could have been raised on appeal to the justices under the preliminary notice will now never be known.

The future

While, as has been explained above, the decision in the *Yiewsley and West Drayton* case has simplified and improved the law for the recipient of a notice, it cannot be pretended that the present situation is altogether satisfactory from every point of view. It is, therefore, perhaps fitting to conclude by reiterating the views of the Lord Chief Justice and Mr. R. E. Megarry, Q.C., noted at 101 Sol. J. 839, to the effect that it is high time the Ministry of Housing and Local Government applied their mind to the amendment of the sections concerned.

On the 16th December last, Mr. Ronald Bell, M.P., asked in the House whether the Minister was aware that under the present enforcement procedures under the 1947 Act open defiance of planning control could be persisted in with impunity over a period of months. The Minister replied that he was aware of the limitations of the enforcement provisions, but any alteration would require legislation. Perhaps this is the only statement that can safely be made about these sections without fear of contradiction.

R. N. D. H.

Mr. John Frederick Drabble, Q.C., and Mr. Edward Steel have been appointed Judges of County Courts. Mr. Drabble will be the Judge of Circuit 1 (Newcastle, etc.) in succession to His Honour Judge Charlesworth, deceased. He will relinquish his Recordership of Kingston upon Hull. Mr. Steel will be one of the Judges of Circuit 12 (Bradford, Huddersfield, etc.).

Sir Harold Stanford Cooper, Mr. Wilfred Lanceley Heywood, O.B.E., and Mr. William Wallace, C.B.E., have been appointed members of the Restrictive Practices Court.

Mr. Ronald William Francis Pagan has been appointed Official Receiver and Mr. Philip Anthony Lawrence has been appointed assistant Official Receiver for the Bankruptcy District of the County Courts of Liverpool, Bangor, Birkenhead, Chester, Portmadoc and Blaenau Festiniog, Warrington, Wigan and Wrexham.

Mr. Thomas Arthur Tuck has been appointed Official Receiver for the Bankruptcy District of the County Courts of Canterbury, Rochester and Maidstone.

PROBLEMS OF INSURING ATOMIC REACTORS

THE report of the Advisory Committee to the British Insurance (Atomic Energy) Committee was briefly noticed in these columns some time ago (101 SOL. J. 522). Much general and some particular interest derives from the committee's various findings. Clearly the British insurance market regards atomic insurance problems as a challenge which it takes up with considerable verve.

Broadly, a market pool, already formed, will take care of the various insurances required once commercial atomic reactors are functioning. Save as regards risks of radioactive contamination, insurances arising directly out of the constructional and course of erection risks are to be underwritten, as now, by the issue of the usual contractors' fire, special perils or all risks insurance, third party and employers' liability covers and contract guarantee or performance bonds.

Radioactive contamination risks of every type, including own and third party property damage and personal injury to third parties and employees, are to be left the sole responsibility of the reactor owner/occupier *ab initio*. Loss of profits and other consequential damage is to be provided so far as the resources of the market admit once the other insurances have been placed—it is clear that the committee do not visualise any but the largest reactors involving such limitations.

Close co-operation with U.S.A. and European markets is foreshadowed and the committee anticipate that London, always the hub of the world insurance market, has once again set a pace with this atomic insurance pool, which others will doubtless seek to emulate. Already, it has been stated, some seven reactors built outside this country are covered in the U.K. market.

The points of legal importance emerging are prefaced by an insistence that legislation will be needed to give a statutory effect to a code of safe practice in the operation of atomic reactors. So far, personal injury has been remarkably small in the recorded incidents at atomic reactor stations (mainly in the U.S.A.). Without doubt, this has been due to strict discipline among the employees as well as adequate physical protection and safe basic practice. As the recruitment net spreads wider, and remembering the old truism about familiarity and contempt, a higher standard than that set by the overworked factory inspectors in non-atomic fields will be needed.

Solicitors used to grappling with insurance, contribution and indemnity clauses in modern contract wordings will learn with relief that the committee recommend that nobody save the reactor owner shall be made liable for radioactive contamination. Since this appears to go so far as to seek to switch the rights of the injured contractor's employee from his employer to his employer's principal, some thought will be needed here. Clearly radioactive matter is a *Rylands* v. *Fletcher* article and the principal is liable in any event. Perhaps the solution lies in securing the agreement of the trade unions to a wholesale waiver of all employees' rights against contractor employers in such circumstances. Does the Law Reform (Personal Injuries) Act, 1948, stand in the way of such a contracting-out agreement, at least so far as what were formerly called common employment claims?

Two other matters will interest practitioners. First, the committee have taken opinion of leading counsel to the effect that existing fire and explosion policies as now worded cover radioactive contamination damage proximately caused by fire or explosion. Appropriate exclusions of a risk never intended to be covered are expected shortly, leaving this contamination risk to be covered specially by the reactor owners. Secondly, it is clear from the report to what wide extent radio isotopes are now in general use for diagnosis and treatment in medicine; for inducing mutations in plant life; for pasteurisation of food; for sterilisation of drugs; for treatment of rubber and plastics to withstand high temperatures; in thickness gauges; for testing the wear in bearings, boilers and other plant; to examine for cracks and fractures in metal products and to detect leaks in piping.

Since inadequate policy wordings will eventually bring the clients round to see what can be done after the loss has happened, an inquiry or two now may save a rather unpleasant claim being turned down later. Meanwhile, the committee having verbally termed this report their Old Testament, the New will be awaited with interest.

G. W. S.

VACATION OF A "LAND CHARGE"

THE registration of a land charge under the Land Charges Act, 1925, is easy enough. The registrar does not have to decide whether or not it should be registered. But, of course, he will not vacate the registration except on the application of the person registering it or his duly authorised representative, or under an order of the court.

Where a land charge has been registered, it is not usually necessary to seek the aid of the court to get it vacated. Except for the reprehensible purpose of delaying a dealing with the land, it would be singularly futile for the person who has registered the land charge not to have it vacated if it is no longer proper for it to remain on the register, because, if proceedings for its vacation have to be launched, normally the costs will be thrown on him.

In *Re Mayphil Hotel, Battlesbridge, Essex*, which came before the court on 20th December, Vaisey, J., had to deal with an application for the vacation of a land charge pursuant to s. 10 (8) of the Act. As there were no High Court proceedings in existence, the application was made by *inter partes* originating summons in accordance with the usual practice of the Chancery Division. An unusual feature, however, was that the court was also asked to dispense with service of the originating summons on the respondent, the person on whose behalf the registration had been effected.

The application had first come on in chambers, when, according to counsel, Harman, J., had said it should be adjourned into open court, particularly as the summons asked that service on the respondent should be dispensed with.

When in due course the adjourned application was heard, the court was informed that the respondent owed the applicant some costs in connection with some other and earlier proceedings in the county court, which might or might not have been the reason why it had not been found possible to trace him and serve him. The affidavit in support,

moreover, also showed that the so-called charge could not possibly have been a valid charge on the land. The letter which had been treated by the respondent or his advisers as creating a charge affected a sum of money on deposit (amounting at the time of the application to £20) and not the land in respect of which the money had been deposited.

The learned judge was satisfied on the evidence that there was no valid land charge. On being assured that the money on deposit could not be dealt with without the concurrence of the respondent, he said it was unnecessary in those circumstances to require the applicant to give any undertaking in respect of it. But he said that in the absence of the respondent he did not like to make an order on the originating summons in its present form, and directed that it should be amended to make it not *inter partes*, and to omit the request for dispensation with service. The learned judge asked that a minute should be prepared by counsel in which it should be appropriately expressed that, pursuant to s. 10 (8) of the Act or in the exercise of its inherent jurisdiction, the court, being of opinion that there was not and had not at any time been such a land charge in existence, ordered the entry thereof in the register to be vacated.

It should not, however, be overlooked that applications under s. 10 (8) of the Act have a limited utility. In *Re Engall's Agreement* [1953] 2 All E.R. 503, where there was a question as to whether a contract was or was not still in existence, it was held (also by Vaisey, J.) that it was not possible to use this machinery to obtain an adjudication on the existence or non-existence of the contract. In that case there had been delays in the completion of a conveyance and the vendors had served a notice to complete. Although there was considerable delay after the time specified in the notice, there was nevertheless some doubt as to whether the specified time was long enough and the notice valid. The learned judge pointed out that the existence or non-existence of a contract at any relevant time was of the utmost importance and was a matter which ought to be considered carefully, and in an appropriate manner. To ask that a charge should be removed from the register before the substantive point as to whether or not a contract was in existence had been decided by the appropriate means of an action, seemed to him to be putting the cart before the horse. In his view, the charges register was merely a record, and whether the record of an alleged contract should remain or not depended on the question whether or not that contract existed. The summons in that case was dismissed.

P. H.

INTESTACY AND THE "STATUTORY TRUSTS": ANOTHER VIEW

IT has these many years been a judicial if not a national sport to hurl ridicule and abuse at that anonymous intangible, the statute draftsman. "A B C's" article (101 SOL. J. 893) on the above subject, however, makes me wonder whether or not the hunter's boomerang has for once been flung too high, with the usual embarrassing sequel.

In my view, and with the greatest respect, "A B C," the learned counsel whose article he refers to (which I have not, as they say on the Bench, had the advantage of reading), and Harman, J., in *Re Lockwood* [1957] 3 W.L.R. 837; 101 SOL. J. 886, have each not only missed the point of the subsection the practical repeal of which they postulate, but also misread it.

Object of subsection (5)

Both this subs. (5) (s. 47 of the Administration of Estates Act, 1925), and subs. (2), as a complement to which the former was inserted in 1952, are concerned not with trusts not coming into operation, but with those that do so, and subsequently fail. In other words, the draftsman was sufficiently kind and perspicacious to visualise the case where on an intestate's death the beneficiaries were settled but were minors, so that others might have to be found at a later date in the event of the original beneficiaries' premature demise.

He thought of, say, *I*, a widower and orphan, dying intestate leaving a brother, *B*, an only child, *S*, and an uncle, *U*, him surviving. *S*, a minor, is entitled to the estate contingently on attaining twenty-one or marriage. *B* subsequently dies, and later, at the age of twenty, *S* is killed, unmarried. It might be argued that *U* would then be entitled by virtue of s. 46 (1) (v), so s. 47 (2) (*a*) provides that in such a case *I* is deemed to have died without leaving issue living at his death. The position is therefore much simplified; we refer back to *I's* death, *S* is scratched, and *B* being then of age is clearly entitled. So on *S's* death his father's estate goes to *B's*.

However, no similar provision was made in 1925 for failure of the statutory trusts in favour of relatives other than issue, and it is this omission that the 1952 Act seeks to repair.

It is worth noting the difference between trusts failing and trusts not coming into operation, e.g., between the position in the above example and that where, say, *S* had predeceased *I*. It is important, because the powers conferred by ss. 31 and 32 of the Trustee Act of "even date" were expressly applied to the statutory trusts by s. 47 (1) (ii) of the Administration of Estates Act, so that, in my first example, not only would *S* have had the benefit of the income from the time of his father's death until his own, but up to half the capital could have been disbursed for his benefit; so although the trust in his favour eventually fails, it has in the meantime had a very real significance; for while *B* is deemed, by construction, to have taken an absolute interest on *I's* death, he takes by physical necessity subject to the inroads into the trust fund made during *S's* lifetime—as the Act concedes: "or so much thereof as may not have been paid or applied under any power affecting the same" (s. 47 (2) (*a*) and (5)).

I have risked wearying the reader by explaining at such length my conception of the *object* of the new subs. (5), and of subs. (2), because it has been treated with such contempt that I feel the draftsman's wholly laudable intention must have been overlooked.

"Trusts in favour of any class of relatives"

The next point on which we should be clear is the meaning of the words, "the trusts in favour of any class of relatives of the intestate." Assuming that the class is that of uncles (as in *Lockwood's* case—skip the aunts) the trusts would be

those set out in s. 46: ". . . on the statutory trusts for the uncles of the intestate (being brothers of the whole blood of a parent of the intestate)." Note that here there is *no* reference to surviving the intestate.

Now see what "the statutory trusts for the uncles" are, by reading s. 47 (1) (i) with subs. (3). "In trust, in equal shares if more than one, for all or any the uncles or uncle of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, *and for all or any of the issue living at the death of the intestate* [who attain twenty-one or marry] *of any uncle of the intestate who predeceases the intestate* . . ." (and then follows the *per stirpes* provision).

It will be seen that the "statutory trusts for the uncles" include trusts for a deceased's uncle's issue, and it is logical to suppose that, when subs. (5) speaks of members of a class of relatives, it refers to all those who could benefit under the trusts in favour of that class, to which it has already referred. In fact, it must do so, because if there are adult issue living of a primary member of the class, the trusts in favour of that class cannot fail, even though no primary member survive the intestate, and no primary member himself benefit.

This is where, in my always respectful submission, the subsection was misread in the *Lockwood* case. As issue of a deceased uncle survived the intestate, the "trusts in favour of a class of relatives" (uncles) did *not* fail. The statutory trusts in favour of uncles took effect, thus: "In trust, in equal shares if more than one, . . . for all or any of the issue living at the death of the intestate [who attain twenty-one or marry] of any uncle of the intestate who predeceases the intestate, such issue to take," etc.

If the deceased uncle's issue are all under age, then the trusts in favour of the class of relatives *will* fail if none attain twenty-one or marry, and then the Crown can step in, but subject always to the previous exercise of the powers of maintenance and advancement. However, as soon as anyone marries or comes of age, then subs. (5) can never apply; and if, as I expect, the issue were of age at the hearing in *Re Lockwood*, then subs. (5) should never have been mentioned.

"Member of that class"

Admittedly, there is left the inconsistency between the two references to "member of that class" in the subsection; but as the "trusts in favour of any class of relatives" can *only* fail by reason of no member of that class, *and no issue of any member of that class*, attaining an absolutely vested interest, one is bound to read in my italics, in spite of their actual omission here and actual inclusion at the end. On the other hand, one would by no means be bound to read them in where they *do* appear, and if they had been left out there as well, real confusion might result, thus:—

Suppose the words "or issue of any member of that class" had not appeared in the subsection at all; that Miss Lockwood had just one cousin, who subsequently died under age and unmarried; and further, that there was a "half-uncle" who died after the intestate, but before the cousin. The trusts in favour of the "whole-uncle class" would fail on the death of the cousin, and by s. 47 (5), as triumphantly amended by "A B C," the intestate would be deemed to have died without leaving any member of that class living at her death. Actually she did just that—there *was* only issue of a member then living. Is she to be deemed to have died without such issue her surviving as well? Would the half-uncle's estate take, as being the next class entitled at the intestate's death, failing the whole-uncle class, or would the Crown collect, as being the only beneficiary in existence when the "whole-uncle trusts" did eventually fail? We should be grateful that the draftsman obviated this conundrum (by providing that the intestate in such a case would be deemed to have died without leaving either whole-uncles or whole-uncles' issue, so that the half-uncle's estate would collect) and forgive him for his earlier omission, which cannot matter.

If the profession is hereby encouraged to see that no one is ever allowed to die intestate, the mental wear and tear of the Bench, the Bar, writers and readers will not have been in vain.

J. H. M.

["A B C" writes: "To reach the conclusion reached by the author it is necessary to construe the words 'member of that class' in the opening words of the new subs. (5) ('where the trusts in favour of any class of relatives of the intestate, other than issue of the intestate, fail by reason of no member of that class attaining an absolutely vested interest . . .') as including, as well as a member of one of the classes of relatives specified in para. (v) of the table in s. 46 of the 1925 Act, the issue of such member. The author recognises the difficulty of this construction in the light of the specific reference to issue in the closing words of subs. (5) ('without leaving any member of that class, or issue of any member of that class, living at the death of the intestate'). But this is not the only indication to be found in s. 47 that, when the expression 'member of that class' or the like is used, it means only a member of one of the primary classes specified in para. (v) of the table in s. 46 and does not include the issue of such member, who come in only via s. 47 (3). Section 47 (3) imports in relation to members of the classes specified in para. (v) of the table (with the exception of grandparents of the intestate in whose case it is irrelevant) the concept of the statutory trusts which have already been defined in relation to the issue of the intestate by s. 47 (1), 'with the substitution of references to the members or member of that class for references to the children or child of the intestate.' There is an equation of children of the intestate (a primary class) with 'members of that class,' which must exclude from the expression 'member of that class', in this context, the issue of a member of the class. It is, I think, natural (to use the forceful expression which the author has used) to give to a particular expression a consistent meaning whenever it appears in the same section of a statute. The draftsman has gone to some trouble in s. 47 (2) to give particular meanings to particular expressions, and this makes it the harder to accept a view which involves the interpolation of additional words in s. 47 (5) without the assistance of any explanatory definition such as appears in s. 47 (2). But while I do not agree with the author's conclusions in this article, I certainly welcome the new light (or is it a new darkness?) which he has shed on what is obviously a difficult and controversial question."]

Applicants for Silk who wish their names to be considered for the next list of recommendations should send their applications to the Lord Chancellor's Office before Tuesday, 18th February, 1958. Those who have already made application should renew them before that date.

A course on industrial and factory law will be held under the auspices of the Industrial Welfare Society on 4th, 5th and 6th February at Robert Hyde House, 48 Bryanston Square, London, W.1. Mr. Harry Samuels, M.A., barrister-at-law, will be the lecturer.

Landlord and Tenant Notebook

" BUSINESS STATUTORY TENANCY "

THE decision in *Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* [1958] 2 W.L.R. 1 ; *ante*, p. 17, in which it was held that the exercise by landlords of a right to determine a twenty years' lease of business premises at the end of the first seven years " determined the term demised " but—the notice not having been in accordance with the Landlord and Tenant Act, 1954, Pt. II, notice to terminate requirements—did not destroy the tenancy, calls attention to the expression " business statutory tenancy " used by Sellers, J., in his judgment in *Castle Laundry (London), Ltd.* v. *Read* [1955] 1 Q.B. 586.

The expression " statutory tenancy " made its first appearance in *Hunt* v. *Bliss* (1919), 89 L.J.K.B. 174, and later became part of the marginal heading of the Increase of Rent, etc., Restrictions Act, 1920, s. 15, which defined the rights and obligations of a tenant who retained possession of a dwelling-house by virtue of that Act. Its use has been judicially deplored and welcomed. Those against have, of course, protested on the ground that the so-called tenant has no estate or property as tenant, but merely a personal right of occupation ; those in favour have called it a convenient but inaccurate term. Without taking sides, I venture the observation that the factor of convenience often prevails in such circumstances, and I believe that it would be possible to find, among the judicial utterances of the deplorers, references to such phenomena as " void contracts " and " bigamous marriages."

The expression has since been applied by the Landlord and Tenant Act, 1954, to interests (to use a neutral term) created as the result of proposals under Pt. I of the Landlord and Tenant Act, 1954 (long tenancies at low rents), in which there may be an element of agreement, though the bargaining power of the landlord is restricted. But is it right or expedient to apply it to cases in which security of tenure is conferred by an Act of Parliament which does not proceed on the basis that the contractual term has come to an end ? Is an agricultual tenant whose tenancy, " instead of terminating on the expiration of the term for which it was granted," continues as a tenancy from year to year by virtue of the Agricultural Holdings Act, 1948, s. 3, or one who successfully serves a counter-notice under s. 24 (1) of that Act, an " agricultural statutory tenant " ? And does this apply, *mutatis mutandis*, to a business tenant whose tenancy, by virtue of the Landlord and Tenant Act, 1954, s. 24 (1), does " not come to an end " ?

Term and tenancy

In *Castle Laundry (London), Ltd.* v. *Read*, *supra*, the defendant was a lessee of business premises under a lease for twenty-one years from 25th December, 1947, one clause of which provided that either landlord or tenant might determine it by six months' notice expiring at the end of the seventh or of the fourteenth year. On 11th June, 1954, the landlords gave such a notice, expiring 25th December, 1954. On 1st October, 1954, Pt. II of the Landlord and Tenant Act, 1954, became law. On 19th January, 1955, the landlords gave the tenant what was called a " notice to quit " expiring on 22nd July, 1955. On 21st February, 1955, they issued an originating summons asking for declarations that the second notice was effective and whether they could determine the lease by notice served to expire on any day prior to 25th December, 1961.

Considering the effect of the two notices, Sellers, J., held that the first had " cut down the term to seven years, but not put an end to the tenancy " and that the second notice had then terminated the tenancy.

Security of tenure by Act of Parliament has indeed subjected our vocabulary to a strain which it was not designed to bear. Cutting down the term without terminating the tenancy would have meant nothing to a seventeenth or eighteenth century conveyancer ; indeed, term and tenancy were synonyms, the essence of a tenancy being that it would come to a certain end—terminus.

It was in these circumstances that Sellers, J., described the position in these words : " The contractual tenancy, so it is said upon behalf of the landlord, came to an end on 25th December, 1954, but, because of the operation of s. 24 of the Act—the Landlord and Tenant Act, 1954—the tenancy did not come to an end. I think it may rightly be said to continue as a *business statutory tenancy* which, so the landlord contends, has been terminated by the notice which the Act requires."

Notice not in form

I will return to this question of terminology later, some observations which are in point having been made in *Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* The facts of that case were that, under a twenty years' lease which had commenced in 1950, containing a clause enabling either party to determine it at 29th September, 1957, by a six months' notice, the landlords had served such a notice on 17th January, 1957. The notice was in the ordinary form, ignoring Pt. II of the Landlord and Tenant Act, 1954. In this case the tenant took the initiative, issuing a summons for a declaration that the notice was ineffective.

Harman, J.'s reasoning may be summarised as follows : by s. 24 (1) of the Act " a tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act " ; by s. 25 a landlord may terminate such a tenancy by a notice in the prescribed form specifying the date of termination, which is to be not more than twelve nor less than six months from service of the notice ; no such notice had been given ; but although, as was held in *Orman Bros., Ltd.* v. *Greenbaum* [1955] 1 W.L.R. 248 (C.A.), a notice to quit not conforming to the Act's requirement is invalid, and, by virtue of the definition in s. 69, a notice exercising an option to break is a " notice to quit," the reasoning in *Castle Laundry (London), Ltd.* v. *Read* showed that a notice exercising an option would bring the contractual relationship to an end but would not terminate the tenancy. It followed that while the effect of s. 24 was that the tenancy was not terminated, it did not follow that the notice exercising the option had no effect at all. " The principle must be that the bargain should not be altered by the statute more than is necessary to give the statute its proper effect."

" Statutory variation "

Harman, J., considered Sellers, J.'s " business statutory tenancy," a convenient phrase as long as one did not confuse it with the so-called " statutory tenancy " under the Rent

Restrictions Acts, "that, of course, being not a tenancy at all, whereas, having regard to the language used in the Act of 1954, the term must be thought of as continuing by way of a statutory extension: see the observations of Denning, L.J., in *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* [1956] 3 All E.R. 624: 'The right view I think is that the common-law tenancy subsisted with a statutory variation as to the mode of determination.'"

Whatever nomenclature is adopted is open to some objection. Up to a point, the position of a tenant whose tenancy "shall not come to end," etc., by reason of the operation of the Landlord and Tenant Act, 1954, s. 24, is comparable to that of a tenant who retains possession of a dwelling-house by reason of the operation of rent control legislation: the landlord may be able to recover possession on grounds connected with his desire to occupy the premises himself or on grounds connected with the tenant's shortcomings in such matters as payment of rent or treatment of the premises. But the business tenant enjoys an estate in land; there is, for instance, no reason why he should not be entitled to assign his extended term or dispose of it by will. Denning, L.J.'s "with a statutory variation as to the mode of determination" seems at first sight to come nearer the mark, but both the expression "variation" and the expression "mode" grossly understate the position. (Incidentally, references to notices to break or determine as "not having been in the *form* required by s. 25 (1) of the Landlord and Tenant Act, 1954," made *passim* in the authorities mentioned, may be said to overlook the very considerable differences in substance). Perhaps the much maligned parliamentary draftsmen have hit upon the happiest phrase when using, in the Rent Act, 1957, Sched. IV, para. 11, the words "a tenancy continuing by virtue of s. 24 of that Act" (the Landlord and Tenant Act, 1954). Hypercritical purists may object that a tenancy is the creature of agreement and no Act of Parliament can compel *consensus;* but if accuracy is to be sacrificed to convenience (*cf.* "withdrawal of a notice to quit" and *Tayleur* v. *Wildin* (1868), L.R. 3 Ex. 303) this phrase does seem to meet the requirements of the situation.

R. B.

HERE AND THERE

NEW CAPS FOR OLD

It is a confession of advanced senility to admit that one vividly remembers postmen in those little forward-sloping shakos they used to wear. The shape goes back to an even more remote antiquity. It was worn by the mid-Victorian Volunteers whose accoutrements you may study in the older volumes of "Punch." As headgear it was smart and full of character. It suggested purpose and responsibility. It gave the profession of postman the same sort of individuality that the wig gives the barrister, as was proper for men who followed the fantastic and mystical calling of carrying human secrets by the thousand in bags on their backs, love and hate and heartbreak and blackmail and fortune and ruin. Then in the nineteen-thirties there took root in the official mind the inexplicable notion that all uniformed men must look as much as possible like bus conductors—milkmen and messenger boys and prison warders and postmen, all reduced to one nondescript level. Perhaps it was a carry-over from the peaked cap of the first World War but the effect was, for the most part, singularly slovenly. Postmen certainly have never been the same since. Formerly the postman was someone; now he might be anyone. Yet here and there one found uniformed heads unsubmerged by the rising tide of those peaked caps, and one grey citadel that stood defiantly, like Ararat above the Flood, was the Law Courts. All the attendants there in their smart high-collared tunics and round pill-box caps, half-way between a kepi and a shako, had managed to preserve their traditional individuality. They were as they had been when Queen Victoria opened the building in 1883 and there seemed no particular reason why they should now melt into the indeterminate herd. Compared with them how utterly unmemorable seemed the attendants at the Houses of Parliament. But now their glory is in process of departing. They are to have bus-conductor pattern caps, open-collar jackets and collars and ties. The first of the new uniforms have already appeared and one's criticism of them is, not that they look strange, only that they look so disconsolately banal, a variation on a rather dreary and all too familiar theme. In their quiet way the old uniforms were as much part of the London scene as the costumes of the Warders at the Tower of London. What about putting *them* in bus conductors' caps?

CHANGING PALACE

If the outward appearance of the custodians of the Palace of Justice is changing, the new year opens with some pretty drastic alterations in its very structure. The feeding arrangements in the crypt for practitioners and public have always resembled nothing to be seen anywhere else in the whole wide world, and the bar which almost filled the long vaulted corridor just beyond the Central Hall was surely the most peculiar pub in London. There was something strangely archaic about the vista of its counters, and the ecclesiastical severity of its grey stone setting. It was like trying to carouse in Canterbury Cathedral. Now the eastern half of the bar has been shorn off at a blow, and sealed off with tightly fitting plaster board from floor to vaulting. From within come all the sharp staccato mechanical noises of demolition and remodelling and what will eventually emerge will be an extension of the dining-room accommodation. Meanwhile the fairway to the eastern block is completely cut and a devious alternative route has been charted from the Central Hall skirting the enclosed and devastated area. Elsewhere the monastic severity of the building is being relieved. On the library staircase an expanding collection of historical legal portraits, gathered together mainly through the discrimination of the librarian, Mr. R. A. Riches, attracts increasing admiration. In the Central Hall the elaborately embroidered purse of an 18th century Lord Chancellor hangs beneath Lord Hatherley's enormous portrait. That vast hall, into which the architect put some resemblance to the Upper Church at Assisi, could do with more large pictures. It is a pity that when the life-size portraits of the Great Fire judges at the Guildhall were damaged in varying degrees during the war, the City of London, instead of dispersing them, as they did, never thought of presenting them *en bloc* to the Law Courts. There were a score or more commissioned from Michael Wright in recognition of

the judges' services in determining the post-Fire boundary disputes. They are all over the place now, some restored, some awaiting restoration, but they would have been the making of the Central Hall. The thing the Central Hall must go easy on is sculpture. Blackstone's statue, it is true, has dignity and a decent modesty. But the monument to the architect of the building displays the same rhetorical over-statement which has been almost too much even for the gothic splendours of Westminster Abbey. Lord Russell of Killowen, C.J., sitting severely enthroned in the north-west corner, is represented in much the same spirit. It would be interesting to see what we would get if we matched it with a Henry Moore of Lord Goddard, C.J., in the opposite corner.

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Cheques Act, 1957

Sir,—The letter you publish on p. 969, vol. 101, on this subject does me less than justice. What I said in my original letter was "In exchange for . . ." If carefully read this will be seen to be strictly accurate.

In dealing with the protection of bankers one is reminded of Lord Bramwell's famous *dictum* that he was constantly told that banking could not go on if particular conditions and obligations were imposed on bankers, but that he invariably found that banking did nevertheless go on and flourish. But there is a world of difference between allowing the banker to collect cheques for profit and imposing in effect a statutory duty on the banks to collect certain instruments. "A banker was definitely forbidden to pay crossed cheques contrary to the crossing by the Drafts on Bankers Act, 1858, and the Crossed Cheques Act, 1876." Why should not one who profits take his share of the risk? His claim for special immunity at law will have to be stronger, one hopes, than the nebulous assertion that the retention of part of his ordinary liability is "archaic, arbitrary and anomalous."

Further, it is evidence that your correspondent has not read the full judgment of Sellers, J., in the *Nu-Stilo* case. If he had he would realise that the banker was in fact accorded the full protection of s. 82 in respect of the first cheque converted. It was the second cheque, in favour of a third party and for the (in the circumstances) considerable sum of £550 10s. 1d., that started the chain of conversions amounting to nearly £5,000 for which the bank was held liable. In respect of this cheque it was found that the defendants "departed from the ordinary standards of good banking."

The reasons your correspondent gives for his view that the present protection of collecting bankers is too little were ably argued in respect of s. 82 by Mr. Maurice Megrah in an article in the December, 1956, issue of the *Journal of the Institute of Bankers*. But even Mr. Megrah does not pursue the argument of point (iv) beyond suggesting that there is some parallel between the position of a paying banker (with no option but to obey his customer's mandate) and the collecting banker (with no option but to collect). Presumably because the first is a legal requirement, whilst the second was a practical consideration with profit as its motive, so far as uncrossed items were concerned.

St. Albans. P. MCLAUGHLIN.

REVIEWS

Foa's General Law of Landlord and Tenant. Eighth Edition. By H. HEATHCOTE-WILLIAMS, M.A., Q.C., Bencher of the Inner Temple. With E. DENNIS SMITH, LL.M., of Gray's Inn and the Oxford Circuit, Barrister-at-Law, RONALD BERNSTEIN, B.A., of the Middle Temple and the Wales and Chester Circuit, Barrister-at-Law, and CHRISTOPHER PRIDAY, B.A., of Gray's Inn and the Oxford Circuit, Barrister-at-Law. 1957. Ipswich: The Thames Bank Publishing Co., Ltd. £8 8s. net.

A good deal has happened since Judge Forbes edited, single-handed, the seventh edition of "Foa" (the publishers being Hamish Hamilton (Law Books), Ltd.). It was then—in 1947—that the title was changed, by way of indicating that "Foa" left out the Rent Restrictions Acts (and other emergency measures). These are still omitted, but the enactment of the Agricultural Holdings Act, 1948 (in force as Pt. III of the Agriculture Act, 1947), at the beginning of the ten years' interval, and of the Landlord and Tenant Act, 1954, towards its close, suggest that there is some prospect of special legislation of this kind settling down, and the time for publishing a new edition has been well chosen. It is no exaggeration to say that the editorial team have collected and arranged all the authority that there is to be found on these statutes, the sub-division being admirable, and that all the latest developments in the common law and statute law relating to other incidents of tenancies have been recorded in their proper places. The treatment of such a subject as the distinction of a lease from a licence, for instance, shows complete awareness of changes of emphasis indirectly due to the increasing prevalence of statutory security of tenure.

The "venturing a view in the absence of authority" has, as the Preface observes, always been a feature of "Foa," and the carrying on of the tradition will be welcomed; indeed, many of us will wish that the editors had been less diffident. An equally useful feature has been the criticism, often very provocative, of authority which *is* available; this feature, too, has been maintained, though there are occasions—for instance, the treatment of *Doe d. Macartney* v. *Crick* (1805), 5 Esp. 196, draws attention to a discrepancy between contents and headnote which is far less important than the failure to distinguish between addressing and service of notices to quit—when more criticism would not be out of place.

The Principles of Modern Company Law. Second Edition. By L. C. B. GOWER, LL.M. (Lond.), Solicitor. 1957. London: Stevens & Sons, Ltd. £2 10s. net.

This book on its first appearance earned golden opinions as an eminently practical and readable work which boldly discussed controversial topics of company law more usually dodged by text-book writers. It is not and was never intended to be a complete treatise on company law, but it is the better for that, since much that is dull and uninspiring can be left out without harm. The new edition is clearly a labour of love rather than necessity, for on this subject changes in the law by statute or decided case have been few since the first edition. The result is more than worthwhile. The addition of references to Commonwealth and U.S. cases, where they may help to throw light on unresolved problems of English company law, is a great advantage, for few have any easy access to any book which conveniently would lead one to trace such cases. It would be a delight to cross swords with the author as regards some of his views on which the present writer would take a contrary view, because clearly the author does not express a view unless it can be supported logically; the whole work is lucid and logically argued, and one must treat its contents with great respect even when in disagreement. This book is one which you can pick up and read, not for educational purposes, but solely for pleasure, and yet in taking your pleasure you will also learn. To purchase this book is to spend 50s. (less, it is hoped, 8s. 6d. in the £) wisely and well.

The Elements of Estate Duty. Second Edition. By C. N. BEATTIE, LL.B., of Lincoln's Inn, Barrister-at-Law. 1957. London: Butterworth & Co. (Publishers), Ltd. £1 7s. 6d. net.

This book, which is said to be intended primarily for the student but which might nevertheless be read with profit by many practitioners, achieves a high standard of exposition. Estate duty will always be a difficult subject, but the author explains its ever-growing complexities and artificialities quite admirably. The law is stated as at 1st August, 1957—just five years after the corresponding date of the first edition. The provisions of the Finance Act, 1957, on the treatment of gifts *inter vivos* are treated on pp. 47-48 with a rather cavalier brevity, but the author is probably wise not to investigate them more deeply.

Your reviewer can find remarkably little to quarrel with in the author's clear statements of the law. He has some lingering doubts (which may not be justified) about the reference on p. 63 to a donee insuring the donor's life and he also has doubts whether note 4 on p. 110 is sound in the light of the Finance Act, 1957, s. 38, and whether the discussion on pp. 132-33 is really important in the case of deaths affected by the 1957 Act. Otherwise the book can be unreservedly commended.

Annual Practice, 1958. By R. F. BURNAND, C.B.E., M.A. Senior Master of the Supreme Court, A. S. DIAMOND, M.M., M.A., LL.D., a Master of the Supreme Court, and B. G. BURNETT-HALL, M.A., Barrister-at-Law. 1957. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd.; Butterworth & Co. (Publishers), Ltd. £5 10s. net. (Two volumes.)

The form of the Annual Practice has been revised, both volumes now containing text. Expense to users is to be kept down by publishing volume 2 only as necessary instead of annually as hitherto. Volume 1 will continue to be published annually and will in future contain a supplement to volume 2. It also contains the tables of cases and statutes and the index, which refer to both volumes.

Volume 1 contains the Rules of the Supreme Court and additional notes on procedure and practice, the Tables and Practice Masters' Rules and the appendices of forms to the R.S.C. Volume 2 contains other special Orders, Rules and Acts.

An Introduction to Company Law. By J. A. HORNBY, M.A., LL.B., Barrister-at-Law. 1957. London: Hutchinson & Co. (Publishers), Ltd. 18s. net.

There are already too many books serving as an introduction to company law. This newcomer is as good as most and better than many. It is well written and deals clearly and adequately with sufficient of company law to serve as a satisfactory introduction to the subject. The price is quite reasonable and the work can be recommended.

Paterson's Licensing Acts. Sixty-sixth edition, by F. MORTON SMITH, B.A., Solicitor, Clerk to the Justices for the City and County of Newcastle-upon-Tyne. 1958. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. £3 7s. 6d. net.

The past year has not been an eventful one in the field of licensing law. The preface to Paterson mentions the Finance Act, 1957, the Aliens Order, 1957, the Lands Tribunal Rules, 1956, the Spirits Certificates Regulations, 1957, and a number of new decisions.

The Lawyer's Companion and Diary, 1958. Editors: W. H. REDMAN, of the Central Office, Royal Courts of Justice, and LESLIE C. E. TURNER. 1957. London: Stevens & Sons, Ltd.; Shaw & Sons, Ltd. £1 7s. 6d. net.

The appearance of the Lawyer's Companion and Diary each year, while not unexpected, is always welcome. We salute it once more in its one hundred and twelfth year of publication.

The English Bar and Supreme Court Civil Litigation. By ARTHUR HEREWARD ORMEROD. 1957. London: Longmans, Green & Co. 2s. 6d. net.

This booklet is one of a pair published on behalf of the British Council, the other being a revised edition of Sir Maurice Amos' "British Criminal Justice." This is hardly a companion work, however, as regards its scope; it is largely confined to a sketch of civil litigation in the High Court, and it professes to be written from a particular point of view, that of the Bar. Accordingly, it starts with a short account of the history of the profession and of some of the justifications for the division of it into two branches.

Addressed as it is to a lay public and, one imagines, with an eye on a foreign readership, the booklet seems somewhat handicapped by this restricted approach. But it is refreshing to find a professional writer for laymen on the legal system who does not bang the drum too loudly, and whose method is to examine the utility of institutions rather than to emphasise their circumstantial pomp. Some fine pictorial illustrations give vividness to the whole.

"THE SOLICITORS' JOURNAL," 16th JANUARY, 1858

ON the 16th January, 1858, THE SOLICITORS' JOURNAL described the opening of the new Court of Probate and Divorce: "On Tuesday last Mr. Justice Cresswell took his seat for the first time as Judge of the Court of Probate. A numerous attendance of the Bar . . . assembled to do him honour . . . It is impossible to exaggerate the importance of having a first-rate judge in a new court. There is inevitably a great deal that depends on the individual judge, and not on the law itself, while practice is still unformed . . . And the Court of Probate and Divorce has to steer through innumerable difficulties, and demands great and varied qualifications in its judge. He will have to interpret two long statutes passed after a warm debate and representing the issue of endless compromises. He will have to mould a mass of legal learning, which mounts into the antiquities of Church history and Roman law, so as to give it a shape in harmony with modern notions and modern wants. He will have to impose decorum and moderation on the fiercest of all litigants, those who are quarrelling over a dead man's fortune and those who hate the person they have sworn to love. He will have to teach the rules of common law evidence to a Bar which is confident in its own superior knowledge of ecclesiastical learning. He will have to combine a power to direct a jury with a power to analyse the complicated rules of private international law . . . Mr. Justice Cresswell unites these qualifications in a very singular degree. His extreme impartiality, his disdain of clap trap, the subtlety of his reasoning, the admirable lucidity of his language, his command over practitioners and juries . . . and the respect universally paid to his learning and his strong love of justice, all combine to adapt him, beyond the standard of ordinary judicial fitness, for the post which he has consented to fill."

The MARQUESS OF READING has been elected Master Treasurer of the Middle Temple for 1958.

Mr. HAROLD EDWIN PIFFE-PHELPS, an assistant Registrar, has been appointed Registrar of the Rochester, Cranbrook and Tenterden, Gravesend, Maidstone, Sheerness and Sittingbourne County Courts and District Registrar in the District Registries of the High Court of Justice in Rochester and Maidstone, in succession to Mr. T. B. Bishop, Registrar of Sheerness and Sittingbourne, Mr. G. Pritchard, Registrar of Maidstone and Cranbrook and Tenterden, and Mr. Milburn V. Mackey, Registrar of Rochester and Gravesend, all of whom have retired.

Mr. ALFRED JOHN SPARK, Registrar of Newcastle upon Tyne and Morpeth and Blyth County Courts and District Registrar at Newcastle upon Tyne, has been appointed, in addition, Registrar of the Alnwick County Court in succession to Mr. R. Middlemas, who has retired.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

House of Lords

PATENT LICENCE: AUDITOR'S DUTIES IN RELATION TO ROYALTIES

Fomento (Sterling Area), Ltd. *v.* Selsdon Fountain Pen Co., Ltd., and Others

Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Keith of Avonholm and Lord Denning. 4th December, 1957

Appeal from the Court of Appeal ((1956), 73 R.P.C. 344).

The appeal raised questions on the true construction of a document called a deed of terms, dated 17th May, 1950, the short effect of which, together with a contemporaneous sub-licence, was to grant to the respondent company a full but non-exclusive sub-licence, on certain terms as to royalties, for the manufacture and sale of ball-pointed writing instruments and refills, which were wholly or partially protected by certain letters patent. By cl. 7 it was provided that the respondent company should keep all necessary books of account relating to the sale or distribution of the patented articles and containing such complete entries as might be necessary or appropriate for computing royalties and should, when required by the licensors, produce their books to the auditors of the licensors and should give them all such other information as might be necessary or appropriate to enable the amount of the royalties payable to be ascertained, provided that such auditors should, if so required by the respondent company, give an undertaking to treat all such information as confidential information disclosed only for the purpose of verifying the amount of the royalties which had become payable. In 1954, an accountant, acting on behalf of the appellant company, which stood in the position of sub-licensor, carried out an inquiry under cl. 7 to ascertain the royalties payable. The documents produced by the respondent company concerned refills marketed by them, therein described as "Type A," which were within the relevant patent field. The documents also referred to sales of other refills, described as "Type B" and "Type C," which were stated not to have been included in the returns because they were outside the patent field. The auditor asked to be supplied with specimens or specifications of Types B and C so as to satisfy himself of the correctness of that contention. The respondent company refused on the ground that it was not obliged to give information of its business outside the patents. In this action the appellant company sought a declaration that the respondent company had committed a breach of the sub-licence justifying its determination. The respondent company counter-claimed for a declaration that by reason of cl. 15 of the sub-licence (commonly known as the "most favoured nation" clause) the respondent company was entitled to more favourable royalty terms than those provided in the sub-licence by reason of the subsequent grant by the appellants of a sub-licence to another company stipulating for a royalty of 5 per cent. on the advertised price to the public. The royalties stipulated for from the respondent company by cl. 3 of their sub-licence were (*a*) 6 per cent. on the full selling price to the public if it was £1 or less, (*b*) 4 per cent. if it was £2 or less, (*c*) 3 per cent. if it was over £2. The respondent company claimed that the 6 per cent. royalty should be reduced to 5 per cent., the other royalties remaining unchanged. Harman, J., found in favour of the appellant company on both the claim and the counter-claim. The Court of Appeal having reversed his decision, the appellant company appealed to the House of Lords.

VISCOUNT SIMONDS said that it was not disputed that if there had been a breach of cl. 7, the sub-licence had been lawfully determined. It was deceptively easy to say that it was the auditor's duty to ascertain the amount of the royalties payable and that any information which helped him to do so must be necessary and appropriate. But that answer was radically unsound. In effect, the auditor said: "I have all the information which enables me to compute the amount of the royalties on the articles which you say are patented, but how do I know that you are not mistaken or fraudulent? Let me see the other articles that I may form my own judgment on them." That formed no part of the right or duty of an auditor under such a clause as this. His duty was not detection but verification. He was a watch dog, not a bloodhound: *In re Kingston Cotton Mill Co.* (No. 2) [1896] 2 Ch. 279, 288. It was an auditor whose rights were being considered. It was not part of his professional expertise to determine whether or not an article was protected by a patent. The clause had not the scope claimed. There was no valid reason for saying that the clause was intended to authorise a roving inquiry by the licensor through the auditor to see whether the licensee was manufacturing under the patent other articles than those which he admitted to be protected. Such an interpretation of the clause was repugnant to common sense and should be rejected. The appeal should be dismissed as regarded the claim. As to the counter-claim, the effect of the sub-licence to the other company, which presumably competed with the respondent company, was to enable it to pay a 5 per cent. royalty in respect of a wide range of goods as against 6 per cent. payable by the respondent company. That was precisely the competitive advantage against which cl. 15 was intended to protect the respondent company. But it was said that if the sum of the royalties at 5 per cent. paid by the other company in respect of all the articles covered by cl. 3 of the respondent company's sub-licence (the royalties on which varied from 6 per cent. to 3 per cent.) was added up over a certain period, it might be found (or, at least, it had not been proved that it would not be found) that it was not a lower sum than if they had been paid at the several rates prescribed by the respondent company's sub-licence. This was an ingenious but unconvincing argument. If it turned out that, as regarded any particular section of the patented field, another sub-licensee was granted the right to sell goods at a rate which, in respect of that class of articles, was lower than the appropriate or relevant royalty in the respondent company's sub-licence, then the latter was reduced to the level of the former. The appeal should be dismissed on this point also.

LORD MORTON OF HENRYTON said that the auditor could not ascertain the amount of the royalties payable without ascertaining whether the refills called by the respondent company "Type B" and "Type C" were or were not within the patent. The word "verifying" afforded a strong indication that he was not bound to accept the statement of the respondent company, which was merely a statement of its opinion. It was hard to see why the respondent company should have refused to supply specimens of "Type B" and "Type C" to the auditor. All he would have had to do was to show the articles to a patent agent, hand him the patents and ask him whether either of the articles came within any of the patents. He would not have been revealing any information which was not already in the possession of the public. If the words of cl. 7 were read in their ordinary meaning, the auditor was entitled to ask for this information and the respondents committed a breach in refusing it. On the respondent company's contentions, the appellant company would be bound to rely on its *ipse dixit* and would have no means of establishing whether or not any article shown to have been sold was or was not a patented article. By using the words "all such *other* information," the parties made it clear that the auditor was entitled to ask for and receive information which did not appear in the respondents' books of account, and there was inserted a clear limitation on the extent of that information; it must be "necessary or appropriate to enable the amount of the royalties payable . . . to be ascertained." The information sought by the auditor was of the kind described by these words. The appeal should be allowed as regarded this point. As to the second point, his lordship agreed with the reasoning and conclusion of the judges in the Court of Appeal. On that point the appeal should be dismissed.

LORD TUCKER agreed with Viscount Simonds.

LORD KEITH OF AVONHOLM and LORD DENNING agreed with Lord Morton of Henryton.

Appeal allowed as regarded the claim, and dismissed as regarded the counter-claim.

APPEARANCES: *Shelley*, Q.C., *K. Johnston*, Q.C., and *J. Whitford* (*Payne, Hicks Beach & Co.*); *Russell*, Q.C., and *O. Swingland* (*Rowe & Maw*).

[Reported by F. COWPER, Esq., Barrister-at-Law] [1 W.L.R. 45

LEAVE TO APPEAL: RESPONDENT COMPANY IN LIQUIDATION: TERMS

Inland Revenue Commissioners *v.* Wood Brothers (Birkenhead), Ltd.

Lord Reid, Lord Tucker and Lord Somervell of Harrow

10th December, 1957

Appeal from the Court of Appeal ([1957] 3 W.L.R. 713; 101 SOL. J. 849).

This was an application for leave to appeal by the Commissioners of Inland Revenue, in a matter in which the amount of tax in dispute was £9,000. Since the respondent company was in liquidation this sum was deposited with the Board of Trade which paid only 2½ per cent. interest thereon. The company resisted the application and it was submitted that it would be a hardship if this sum were to remain outside the company's control at so low a rate of interest for the considerable time which must elapse before an appeal was determined.

LORD REID said that leave to appeal would only be granted on terms that the Commissioners of Inland Revenue would not seek to disturb the orders for costs below and would, in any event, pay the respondent company's costs in the House of Lords, and, further, would undertake to pay 3 per cent. interest on the sum involved until the matter was determined, in addition to the 2½ per cent. which the company was receiving from the Board of Trade.

APPEARANCES: *Alan Orr* (*Solicitor of Inland Revenue*); *P. Shelbourne* (*Simmons & Simmons*, for *March, Pearson and Green*, Manchester).

[Reported by F. COWPER, Esq., Barrister-at-Law] **[1 W.L.R. 64**

Court of Appeal

HUSBAND AND WIFE: INDORSEMENT OF COMMITTAL ORDER UNDER MATRIMONIAL CAUSES (JUDGMENT SUMMONS) RULES, 1952, r. 6 (3)

Riding *v.* Riding

Lord Denning, Hodson and Morris, L.JJ.

9th December, 1957

Application, *ex parte*, from Judge Maddocks, sitting as a special commissioner in divorce.

A divorced husband defaulted on payments under a maintenance order for £1 a week made against him in a district registry, and his former wife as judgment creditor obtained, under the Matrimonial Causes (Judgment Summons) Rules, 1952, an order of commitment to prison for six weeks unless he sooner paid the arrears of maintenance and the costs of the summons, amounting in all to £62 6s., but it was directed that the order should be suspended under r. 6 (3) of the Rules of 1952 if the debtor paid by regular instalments 5s. a week off the amount indorsed on the order of commitment in addition to the £1 a week under the maintenance order. The debtor again defaulted on the payments and when further arrears of £56 15s. 6d. had accrued, the judgment creditor applied to the court for the issue of the order of commitment, to be indorsed for the amount of the original debt and also the subsequent accumulated arrears of maintenance—a total of £119 1s. 6d. The district registrar and, on appeal, the special commissioner held that the order should be limited to the sum of £62 6s.

LORD DENNING said that the committal order was directed to issue, but the question was: how was it to be indorsed? On what terms could the husband get out of prison when he was put there? It had been argued that once he was in prison, he could not get out before the end of six weeks unless he paid £119 1s. 6d., that is, the original £62 6s. plus the £56 15s. 6d. that had become due since, and that the order ought to have been indorsed accordingly, whereas the registrar and the judge said that he should be released from prison at once if he paid the original debt of £62 6s. The legal position depended on the true construction of r. 6 (3), which said: "If an order of commitment is suspended on such terms as are mentioned in the last foregoing paragraph, all payments thereafter made under the order shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the judgment, and secondly, in or towards the discharge of the debt in respect of which the judgment summons was issued and the costs of the summons." It seemed to his lordship that that rule dealt with payments made while the order of commitment was suspended. So long as it was suspended, all payments made by the debtor went first in discharge of the current maintenance, before they went against the original debt at all. But that was applicable only so long as the order of commitment was suspended. When it ceased to be suspended and he was actually committed to prison, then it was quite plain that he was committed to prison because of the original default in respect of the sum of £62 6s. That being the sum for which he was committed to prison, it was the sum which he had to pay in order to be released from prison before the end of the six weeks. The appeal should accordingly be dismissed.

HODSON and MORRIS, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *John Corcoran* (*Anthony Uwins, Law Society Divorce Department*, Manchester).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[2 W.L.R. 64**

FACTORIES: DUTY TO FENCE OPENINGS IN FLOORS: "FLOOR"

Tate *v.* Swan Hunter & Wigham Richardson, Ltd.

Lord Denning, Hodson and Morris, L.JJ.

12th December, 1957

Appeal from Donovan, J.

An electrician, employed in a shipyard on maintenance work on cantilever cranes, which were mounted on steel gantries some 100 feet above the ground, fell through an aperture while standing on a wooden plankway connecting up the gantries, and was killed. The plankway consisted of planks placed irregularly alongside each other and going round various parts of the steelwork to enable workmen to get from one part of the structure to another; they could be taken up if desired and were not fixed in any permanent way. Part of the aperture through which the man fell was normally occupied by a ladder which had on the day of the accident been removed to facilitate other maintenance work. In an action by his administratrix against the employers for breach of the duty to fence securely "all openings in floors" under s. 25 (3) of the Factories Act, 1937, Donovan, J., held that the plankway was a floor and that as it was practicable to fence the opening through which the man had fallen, the employers were liable for breach of statutory duty. The employers appealed.

LORD DENNING said that the sole question on the appeal was: What was a floor? There was no definition in the Act to assist. The ordinary and natural meaning of a floor was something within walls, indoors, on which people walked or stood. A plankrun such as this on a gantry, or on a staging or on a scaffolding, did not seem to his lordship to be within the ordinary meaning of a "floor." Donovan, J., seemed to have thought that it was not, in the ordinary sense, a floor, but that the Act ought to be extended to cover it. The court could not go as far as that. The appeal should be allowed.

HODSON, L.J., agreeing, said that there was no question but that the defendants' shipyard was a factory within the meaning of the Act of 1937, and the only question was whether there had been a breach of s. 25 (3) of that Act. It was very difficult by words to describe exactly what it was that this man had been standing on. The judge had referred to some of the ordinary purposes of a floor for which these planks were used, such as that persons passed and repassed over them, and that they were used to stand on. But it was not every place on which workmen stood, on which they passed and repassed, which could be called a "floor." This being a passageway or plankway of an irregular kind, where it was difficult to define the extent of the floor, it was even more difficult to say that the word "floor" was appropriate. One could understand that an opening in a floor was one thing, because that postulated a floor which was not continuous; on the other hand, one might have a floor which simply did not cover the whole of the place, and clearly a floor which did not cover the whole of the place was not aptly described as a floor with a hole in it.

MORRIS, L.J., also concurring, said that in his view the planking on which the deceased was standing was not properly to be regarded as a floor. Appeal allowed.

APPEARANCES: *R. H. Forrest*, Q.C., and *Norman Harper* (*T. D. Jones & Co.*, for *Linsley & Mortimer*, Newcastle-upon-Tyne); *George S. Waller*, Q.C., and *R. P. Smith* (*Rowley Ashworth & Co.*).

[Reported by Miss M. M. HILL, Barrister-at-Law] **[1 W.L.R. 39**

CHARITY: PRACTICABILITY: INTERVENING LIFE TENANCY

***In re* Tacon; Public Trustee *v.* Tacon**

Lord Evershed, M.R., Romer and Ormerod, L.JJ.
19th December, 1957

Appeal from Harman, J.

A testator, who died in 1922, by his will and codicils settled his residuary estate on his daughter for life, with remainder to her children, and, in the event of her having none, he directed his trustees to apply one-sixth part of his ultimate residuary estate in purchasing, adapting and furnishing and equipping suitable premises at Ipswich, Felixstowe or Lowestoft or any or either of those places as a convalescent hospital for nurses or patients or both. His daughter died a spinster in 1952. At the date of the testator's death the one-sixth share amounted to £16,500, a sum which would then have been adequate to enable his trustees to comply with the testator's directions to purchase and equip a convalescent hospital. If the reversionary interest had then been sold, having regard to the daughter's expectation of life and to the possibility that she might have children, it would have fetched £2,400, a sum admittedly inadequate for the purpose. At the daughter's death the one-sixth share fell into possession; it was then worth £10,000, an insufficient sum to carry out the testator's purpose. Harman, J., directed an inquiry, in the form adopted in *In re White's Will Trusts* [1955] Ch. 188, whether it was practicable to carry into execution the trust. In answer to that inquiry, he held that it was not practicable at the testator's death, nor was there at that date any reasonable prospect that it would be practicable to do so at some future time.

LORD EVERSHED, M.R., said that the difficulty had arisen because the gift for the purpose of establishing the particular convalescent home was expressed to take effect on the happening of a future event. The effect of the disposition would be to exclude the next-of-kin unless "impracticability" was shown at the death of the testator. But since the charitable gift was not an immediate gift, the question was not merely whether at the testator's death it was immediately practicable, but also whether it could at that date be said that it would at any relevant date be practicable. The form of inquiry was "whether at the death of the testator it was practicable to carry into execution the trust . . . or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time." The contest before the court had been on the effect of the second half of the inquiry. It was argued that the inquiry was limited to the figure of £2,400 being the actual value of the interest at the testator's death, increased by such interest as it might have earned during the expected duration of the daughter's life. That was not correct. The words of the inquiry meant whether at the date of the testator's death there was any reasonable prospect that at some future date the scheme would be "practicable." Since the relevant proportion of the estate was in 1922 worth £16,500, an amount admittedly sufficient for the intended gift, and since there was then no reason to anticipate the subsequent increase in duty and fall in the value of money, there was at that date a reasonable prospect that it would be practicable to give effect to the trust.

ROMER and ORMEROD, L.JJ., gave judgments to the same effect. Appeal allowed.

APPEARANCES: *Denys Buckley* (*Treasury Solicitor*); *Harold Lightman*, Q.C., *A. C. Sparrow* and *P. S. A. Rossdale* (*Wrinch and Fisher*, for *Block & Cullingham*, Ipswich).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [2 W.L.R. 66

Queen's Bench Division

ROAD TRAFFIC: DANGEROUS DRIVING: AUTOMATISM

Hill *v.* Baxter

Lord Goddard, C.J., Devlin and Pearson, JJ.
19th December, 1957

Case stated by Brighton justices.

The defendant drove a motor van across a road junction at a fast speed, ignoring an illuminated "Halt" sign, and collided with a motor car. The van then continued for a short distance and overturned. Later, in hospital, the defendant said that he could not remember what happened. On a charge of dangerous driving contrary to s. 11 (1) of the Road Traffic Act, 1930, and failing to conform to a traffic sign contrary to s. 49 (*b*) of that Act, the only evidence for the defence was that of the defendant himself, but, the prosecution having no objection, the justices allowed two reports from a doctor, who had examined the defendant, to be put in: these showed no abnormality and it was impossible to say whether the defendant had had a "black out" or not. The defendant contended that he became unconscious as a result of being overcome by a sudden illness. The justices found that the defendant must have exercised skill in driving in order to reach the road junction, but were of opinion that he was not conscious of what he was doing for some little time before reaching the junction and was not capable of forming any intention as to his manner of driving; accordingly they dismissed the charges. The prosecutor appealed.

LORD GODDARD, C.J., said that the admission of the doctor's reports was quite irregular. Agreed medical reports had no place in criminal courts. In any event, they were in no way favourable to the defendant. The first thing to be remembered was that the Road Traffic Act, 1930, contained an absolute prohibition against driving dangerously or ignoring "Halt" signs. No question of *mens rea* entered into the offence. The justices' finding that the respondent was not capable of forming any intention as to the manner of driving was immaterial. What they evidently meant was that the respondent was in a state of automatism. But he was driving and exercising some skill, and undoubtedly the onus of proving that he was in a state of automatism must be on him. This was not only akin to a defence of insanity, but it was a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. This no doubt was subject to the qualification that where an onus was on the defendant in a criminal case the burden was not as high as it was on a prosecutor. There might be cases where the circumstances were such that the accused could not really be said to be driving at all, for example, if he had a stroke or epileptic fit. In the present case, the evidence fell far short of what could justify the court holding that the defendant was in some automatous state.

DEVLIN, J., said that he agreed that, if the onus lay on the defence to produce some evidence of automatism, they had failed to do so, with the result that the justices came to a wrong conclusion in law. He did not find it necessary, before deciding whether there was such an onus, to determine just what part automatism played in liability for crime. It was a novel point that would require careful consideration; the answer would certainly depend, among other things, on the nature of the liability which the prosecution had to establish. Even in a case in which liability depended upon full proof of *mens rea*, it would not be open to the defence to rely upon automatism without providing some evidence of it.

PEARSON, J., agreeing, said that on the facts, if the defendant was driving at all, he was unquestionably driving dangerously, and therefore the question at issue was whether he was driving the car. In any ordinary case, when once it had been proved that the accused was in the driving seat of a moving car, there was, *prima facie*, an obvious and irresistible inference that he was driving it. No dispute would arise on that point unless and until there was evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car. If the burden of proof was on the defence, they failed to prove an extraordinary mischance rendering it impossible for the defendant to control the car and direct its movements. Appeal allowed.

APPEARANCES: *Duncan Ranking* (*Anthony Harmsworth* with him) (*Sharpe, Pritchard & Co.*, for *W. O. Dodd*, Brighton); *John Alliott* (*Jolly & Co.*, Brighton).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] [2 W.L.R. 76

At the annual general meeting of the CHICHESTER AND DISTRICT LAW SOCIETY, held on 10th December, 1957, at the County Hall, Chichester, the following officers were elected for the ensuing year: president, Mr. E. M. Allen; vice-president, Mr. A. A. E. Gooding; honorary treasurer, Mr. R. A. Holland, and honorary secretary, Mr. J. S. Widdows.

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Accrington District Water Order, 1957. (S.I. 1957 No. 2232.) 5d.
Air Navigation (General) (Third Amendment) Regulations, 1957. (S.I. 1957 No. 2249.) 5d.
Anti-Dumping (No. 1) Order, 1958. (S.I. 1958 No. 2.) 4d.
Clay Cross Water Order, 1957. (S.I. 1957 No. 2231.) 5d.
Compulsory Purchase of Land (Scotland) Amendment Regulations, 1957. (S.I. 1957 No. 2248 (S. 105).) 8d.
Electricity (Consultative Council) (Areas) (Amendment) Regulations, 1958. (S.I. 1958 No. 1.) 5d.
Hartlepools Water Order, 1957. (S.I. 1957 No. 2242.) 6d.
Heather-and Grass-Burning (Northumberland and Durham) (Amendment) Regulations, 1958. (S.I. 1958 No. 4.) 5d.
London Traffic (Ealing) Regulations, 1958. (S.I. 1958 No. 13.) 5d.
London Traffic (Prescribed Routes) (Egham) Regulations, 1958. (S.I. 1958 No. 14.) 4d.
London Traffic (Prescribed Routes) (Richmond) (Amendment) Regulations, 1958. (S.I. 1958 No. 15.) 5d.
National Insurance (Industrial Injuries) (Mariners) Amendment Regulations, 1957. (S.I. 1957 No. 2244.) 5d.
National Insurance (Mariners) Amendment Regulations, 1957. (S.I. 1957 No. 2243.) 5d.
Solicitors (Disciplinary Proceedings) Rules, 1957. (S.I. 1957 No. 2240.) 8d. (See *ante*, p. 36.)
Stopping up of Highways (County of Chester) (No. 19) Order, 1957. (S.I. 1957 No. 2246.) 5d.
Stopping up of Highways (County of Lancaster) (No. 14) Order, 1957. (S.I. 1957 No. 2247.) 5d.
Stopping up of Highways (London) (No. 87) Order, 1957. (S.I. 1957 No. 2235.) 5d.
Stopping up of Highways (County of Oxford) (No. 7) Order, 1957. (S.I. 1957 No. 2245.) 5d.
Stopping up of Highways (County of Stafford) (No. 15) Order, 1957. (S.I. 1957 No. 2236.) 5d.
Wages Regulation (Paper Bag) Order, 1958. (S.I. 1958 No. 5.) 7d.

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. Prices stated are inclusive of postage.]

NOTES AND NEWS

Honours and Appointments

Mr. LEONARD AGATE has been appointed clerk to the Portsmouth City magistrates.

Mr. HEDDWYN WINTER JONES, of Grimsby, has been appointed deputy town clerk of Yeovil and will take up his duties on 27th January.

The Charity Commissioners have appointed Mr. WILLIAM JACKSON WOLFE an Official Trustee of Charitable Funds in succession to Mr. Maurice John Richards, who has resigned, with effect from 1st February.

Personal Note

Mr. Edward Claude Fortescue, Banbury magistrates' clerk, will be retiring on 31st March after thirty-two years in that office. He will continue in private practice.

Miscellaneous

FAMOUS BRITISH TRIALS

Sir Norman Birkett is acting as adviser to the producer, Nesta Pain, for a series of six dramatised versions of famous British trials which the B.B.C. Home Service will present fortnightly, beginning on 28th January. The programmes will be one hour in length and the cases will include the Yarmouth Beach Murder of 1900, the Duchess of Kingston's trial for bigamy in the eighteenth century, a case of disputed identity from the 1920's, and the *Sievier* v. *Wootan* libel case.

THE SOLICITORS ACT, 1957

On 2nd January, 1958, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of HERBERT WILLIAM LANGFORD, of "Southcote," No. 39 Enborne Road, Newbury, Berks, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

On 2nd January, 1958, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of JAMES GWYNN THOMAS, of No. 12 Market Street, Narberth, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

On 2nd January, 1958, an order was made by the Disciplinary Committee constituted under the Solicitors Act, 1957, that the name of FRANK HINDLE (admitted 1911), of No. 16 Beaconsfield Road, Haslingden, Lancs, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

DEVELOPMENT PLAN

CITY OF STOKE-ON-TRENT DEVELOPMENT PLAN

On 19th December, 1957, the Minister of Housing and Local Government approved with modifications the above development plan. A certified copy of the plan as approved by the Minister has been deposited at the Town Clerk's Office, Town Hall, Stoke-on-Trent. The copy of the plan so deposited will be open for inspection free of charge by all persons interested between the hours of 9 a.m. and 5 p.m. on each weekday (except Saturday—9 a.m. to 12 noon). The plan became operative as from 1st January, 1958, but if any person aggrieved by the plan desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the approval of the plan, he may, within six weeks from 1st January, 1958, make application to the High Court.

An evening reception and reunion will be held at University College London, Gower Street, London, W.C.1, on Friday, 28th February, 1958 (6.30 p.m.—9 p.m.). Former undergraduates or post-graduates who entered the college during the years 1934–38 are invited. Applications for tickets (which are limited and may have to be allocated by ballot) should be made to the assistant secretary.

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